Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

MADISON ANDERSON, PETITIONER

V.

MERLL JOHNSON, UNITED STATES POSTAL SERVICE,

WAYNE COUNTY CIRCUIT COURT, WAYNE COUNTY

FRIEND OF THE COURT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE 6TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MADISON ANDERSON, IN PRO SE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it was proper for the Court of Appeals by confirmation of the District Court determination to give preclusive effect to a cause of action, though related, that arises subsequent to judgment having been rendered.

2. Whether it was proper for the Court of Appeals by its confirmation of the District Court determination to conclude that the United States Postal Services was properly dismissed on the grounds of administrative claim notice insufficiency and discretionary function exception under the Federal Tort Claims Act (FTCA).

3. Whether it was proper for the Court of Appeals by its confirmation of the District Court determination(s) to conclude that no conspiracy existed between the defendants United Postal Services, Wayne County Circuit Court, Wayne County Friend of the Court, and Merll Johnson to infringe upon the plaintiff's property rights under the United States Constitution, specifically the Fifth and Fourteenth Amendments of the United States Constitution.

A. Whether the Court of Appeals was correct in upholding the District Court decision to set aside that clerk's entry of default against Defendant Johnson in absence of response by the defendant.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties in both the United States District Court of Michigan, Eastern District Court and the United States Court of Appeals for the Sixth Circuit.

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The November 4, 1999 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed (not recommended for full text publication) and is reprinted in the appendix to this petition. The prior opinion of the United States District Court for the Eastern District of Michigan, filed July 31, 1998, is also reprinted in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered November 4, 1999. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws.

STATEMENT OF THE CASE

The plaintiff in pro se complaint grows out of the Defendant United States Postal Service's participation in a conspiracy with Defendant Merll Johnson causing a constitutional infringement upon the plaintiff's property rights through the means of mail.

Prior to the observation by plaintiff of Defendant Johnson's theft of documents from his mailbox on February 12, 1991 (incident was reported), the Defendant had utilized the mail as a means of achieving benefits against the Plaintiff, without notice since the entry of default in September of 1988 based on a paternity action and order of filiation effected by the plaintiff's non-appearance.

Subsequent hearings and appeals in the respective state and federal courts revolve around the entry of default in September of 1988.

The instant matter does not concern itself with the entry of default of 1988 and the consequences flowing therefrom. Rather, it focuses on the United States Postal Service, Wayne County Circuit Court, and Wayne County Friend of the Court's agreement and concurrence (direct and implied), albeit conspiracy, with Defendant Johnson's federal statutory violations and constitutional infringements visited upon plaintiff subsequent to entry of default.

REASONS FOR GRANTING WRIT

The Judgment of the United States Court of Appeals for the Sixth Circuit should be reviewed by this Court

because of the failure of the Lower Court to correct the constitutional property infringements visited upon Plaintiff by the conduct of conspiracy by the Defendants. Notably, the Lower Court recognized the Rooker-Feldman implications involved in the instant matter and the necessity for the United States Supreme Court to correct State Court Judgments. See *District of Columbia Court of Appeals v. Feldman, 460 US 462, 483 n. 16 (1983); Rooker v. Fidelity Trust Co., 263 US 413, 415-16 (1923); Gottfried v. Medical Planning Service Inc., 142 F 3d 326, 330 (6th Cir.), cert. denied, 119 Sct 592 (1998).* Hence, the following arguments and legal rationale that follows provide a justifiable basis for granting the petition.

ARGUMENT I

BOTH THE COURT OF APPEALS AND THE DISTRICT COURT JUDGE ERRED REVERSIBLY IN GRANTING WAYNE COUNTY DEFENDANT'S MOTION TO DISMISS BASED ON RES JUDICATA GROUNDS.

An analysis of the District Court Judge, the Honorable Denise Page Hood's memorandum, opinion, and order on this issue shows that her decision simply tracks or adopts the res judicata rationale and authorities cited by the Wayne County defendants.

If it is granted as the federal courts have held and the federal statute maintains that a federal court must give the same preclusive effect to a state court judgment as would be given that judgment under the law of the state in which the judgment was rendered. See e.g. *Smith Henchman and Gryllis Assoc. Inc. v. Tassie, 990 F2d 256, 257 (6th Cir. 1993); Migra v. Warren City School District, 465 US 75, 81; 104 S Ct. 892; 79 L Ed 2d 56 (1984); 28 USC Sec. 1738,* such court decisions and statute leaves open the question of whether preclusive effect can be given to cause of action, though related, that arises subsequent to a judgment having been rendered.

Specifically, the Court notes at pages 9-10 of her opinion that "[u]nder Michigan law, the doctrine of res judicata precludes collateral attack if: (1) the prior action was decided on the merits; (2) the issues raised in the second case either were resolved in the first, or through exercise of reasonable diligence might have been raised and resolved in the first case; and (3) both actions involved the same parties of their privies." *Reithmiller v.*

Blue Cross & Blue Shield of Michigan, 824 F 2d 510 (6th Cir. 1987).

Proceeding from the above cited case and reasoning, the Court refers to at least nine hearings regarding the circumstances surrounding the Default Judgment and Filiation ordered against the plaintiff, "all of which upheld the circuit's Entry of Default Judgment..." Additionally, the Court buttresses her reasoning by citing *Mattingly v. Citizens Fidelity Bank and Trust Co., No. 86-5192 (6th Cir. September 24, 1987) (unpublished per curiam),* which stands for the proposition that a Court must often look beyond a simple comparison of pleadings in res judicata determinations.

Obviously, her look beyond the pleadings in the instant case led her to the conclusion that res judicata effect should be given to the matter; however, a retrospective survey of the cited authority and rationale from which she proceeds, though legally correct, carries with it glaring omissions and thereby flaws its conclusion.

The first of those omissions requires that we return to *Reithmiller,* supra where under the facts in the instant case the second factor could not have been present inasmuch as the subject matter of the instant lawsuit emerged subsequent to the entry of default involving the Defendant Merll Johnson and was predicated upon the subsequent conduct of the Defendant Merll Johnson (the theft of the defendant's mail).

The second of those omissions require a revisitation of the nine (9) hearings and the circumstances surrounding the default judgment and order of filiation. Upon examination of the 9 court determinations, the court in

each instance concerned itself with the factual components surrounding the entry of default and filiation solely and consequently resolved the matter on state grounds only. [It is immaterial to the resolution of the instant case that some constitutional questions were raised by the plaintiff, if such constitutional questions were never addressed by the state court]. Furthermore, of particular significance to the instance case, the state court simply could not have addressed the constitutional issue(s) nor the federal tort claim issue raised by the subsequent conduct of the Defendant Merll Johnson.

In short, the District Court Judge erred reversibly in granting Wayne County Defendant's motion to dismiss based on res judicata for the reason(s): (1) It fails to address how preclusive effect can be given to a cause of action that arises subsequent to an entry of judgment (default judgment); (2) It fails to answer the question as to whether a finding in a matter on state ground solely has preclusive effect to that same matter grounded on a constitutional issue or federal question.

ARGUMENT II

BOTH THE COURT OF APPEALS AND THE DISTRICT COURT JUDGE ERRED REVERSIBLY IN GRANTING DEFENDANT UNITED STATES POSTAL SERVICES' MOTION TO DISMISS ON GROUNDS OF ADMINISTRATIVE CLAIM (FTCA) INSUFFICIENCY AND DISCRETIONARY FUNCTION

EXCEPTION

1.

The Administrative Claim Grounds

The Defendant, United States Postal Services argued for dismissal of plaintiff's complaint based on a failure on the part of the plaintiff to establish subject matter jurisdiction due to his failure to file a valid administrative claim (Federal Tort Claim) pursuant to *28 USC Sec. 2401(b).*

Certainly, the United States as sovereign is immuned from suit unless it has consented to be sued. *United States v. Sherwood, 312 US 584, 586 (1941). In this connection, the Federal Tort Claims Act (FTCA), 28 USC Sec. 136(b), 2671 et seg.* provides an instance where the United States as sovereign has consented to be sued on the condition that the plaintiff present an administrative claim to the federal agency prior to the initiation of suit. *28 USC Sec. 2675(a)* and that such initiation of suit commence within the two year statute of limitation period prescribed by *28 USC Sec. 2401(b).*

The United States District Court Judge in the person of the Honorable Denise Page Hood concurred with the Defendant, United States Postal Services' contentions.

The plaintiff disagrees with the determination of District Court Judge Hood under the instant facts and thereby contends that court decisions support a more flexible construction or interpretation of both *28 USC Sec. 2401(b)* and *28 USC Sec. 2675(a)* than that provided by the court.

Section 2675 provides that an action shall not be instituted upon a claim against the United States... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied. Thus, *Section 2675* requires that the potential plaintiff give notice to the government of the nature of the

claim and the damages requested. *28 USC Sec. 2675(a).* Failure to timely file an administrative claim with an appropriate federal agency results in dismissal of the plaintiff's claim, since the filing of an administrative claim is a non-waivable jurisdictional requirement. *United States v. Kubrick, 444 US 111, 113; 100 S Ct 352; 62 L Ed 2d 259 (1979).*

Coinciding with the statutory notice requirement of *2675,* the Justice Department has promulgated regulations setting forth the requirements for the presentation of administrative claims for settlement. *28 C.F.R. Sec. 14.1-14.11.* Under *28 CFR Sec. 14.2(a):* "an executed Standard form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain ..." In recognition of the overlap and distinction between presenting a claim in a *section 2675* context and presenting a claim for settlement, most of the circuits have ruled accordingly. See e.g. *Lopez v. United States, 758 F2d 806 (1st Cir. 1985), GAF Corp. v. United States, 818 F2d 901, 919 (DC Cir. 1987); Johnson v. United States, 788 F 2d 845; 848 (2nd Cir.), cert denied, 479 US 914; 107 Sct 315; 93 L Ed 2d 288 (1986); Tucker v. United States Postal Service, 676 F 2d 954, 959 (3d Cir. 1982); Adams v. United States, 615 2d 284; 288-89 (5th Cir. 1980); Douglas v. United States, 658 F 2d 445, 447 (6th Cir. 1981); Charlton v. United States, 743 F 2d 557-561 (7th Cir. 1984). Farmers State Savings Bank v. Farmers Home Admin., 866 F 2d 276 (8th Cir. 1989); Warren v. United States Dept. Of Interior Bureau of Land Management, 724 F 2d 776, 780 (9th Cir. 1984); Bush v. United States, 703 F 2d 491, 494.*

Pointedly, in the Court's factual analysis of the administrative claim issue in the instant case, she does not allude to the call by plaintiff to the Defendant, United

States Post Office on April 25, 1991 (per the attached note to the follow up telephone conversation) advising them of the mail theft by Defendant Johnson and the consequential follow-up letter's response containing criminal charges that could be attributed to the defendant Johnson (Defendant Johnson, as well as the plaintiff, were sent copies). Such follow-up response was unsatisfactory to the plaintiff. It contained the name "postal inspector" as a means of identifying the follow up letter's origin and a telephone number, specifically (313) 226-8249.

Subsequently, the plaintiff called the specific number found at the bottom of the letter to voice his dissatisfaction with the substance of the letter response. During the course of this telephone call to the Defendant United States Postal Service, plaintiff was eventually put in touch with a Mr. Alsteader. Plaintiff's telephone conversation with Mr. Alsteader was brief and not entirely satisfactory to either party. Consequently, the plaintiff was prompted to visit the office of Mr. Alsteader at the United States Post Office building on Fort Street in the City of Detroit.

Upon arrival at the post office on Fort Street in the City of Detroit, plaintiff inquired regarding the whereabouts of Mr. Alsteader. Plaintiff was directed to a location in the building where plaintiff was initially interviewed by a female employee, who upon learning of plaintiff's problem, expressed a willingness to provide him with the necessary complaint papers. However upon attempting to retrieve such complaint papers, the female employee advised the plaintiff that her supervisor forbid her from providing the papers.

Finally, out of sheer frustration, the plaintiff

generated a letter to both the Defendant United States Post Office and Congresswoman Barbara Rose Collins. According to the Court's application of the lenient notice requirements, the plaintiff's complaint must be dismissed because the two aforementioned exhibits that were attached to plaintiff's Response to the Defendant's Motion to Dismiss were dated months after the February 11, 1993 statute of limitations period.

Erroneously, under the instant facts, the Court failed to exercise her power to apply principles of equitable tolling to claim under the Federal Tort Claims Act. See e.g. *DeCasenave v. United States, 991 F 2d 11 (1st Cir. 1993); Schmidt v. United States, 933 F 2d 639 (8th Cir. 1991).* Fairly recently, the Sixth Circuit in *Glasner v. United States Dept. Of Veterans Administration, 30 F 3d 697 (6th Cir. 1994)* held that the statute of limitation of *Federal Tort Claim Act* can be equitably tolled for the reason that the FTCA statute is not jurisdictional.

As the above scenario attests the plaintiff had commenced his complaint with the Defendant United States Postal Service, though by oral communication, well within the February 11, 1993 statute of limitations period. In the interim, the plaintiff had been frustrated by the government's inaction to his inquiries and as a detrimental consequence of such government inaction his "writing" to the government of his plight is deemed untimely. The plaintiff in pro se should not have been subject to the ultimate detriment of a dismissal of his claim under the facts when the Court had at her disposal "equitable tolling."

The rightness or wrongness of the continuing tort rationale that was advanced by the plaintiff in an attempt

to circumvent the statute of limitations argument raised by the defendants is irrelevant in the face of "equitable tolling" that emerges from the facts. See e.g. *Hurt v. United States, 914 F Supp 1346, 1355 (SD WVA 1996)*, where, several courts have concluded *Sec. 2401(b)* may be tolled in instances where the United States engages in continuous tortuous conduct (citation omitted).

Furthermore, the seemingly inflexible language of *28 USC Sec. 2401(b)* admittedly loses some of its teeth under the principle of "equitable tolling."

2.

Discretionary Function Exception

Under the instant facts, the discretionary function exception envisioned in *28 USC Sec. 2680(h)* falls outside the intended purpose of *Section 2675* of the *FTCA*. Under *Section 2675*, "the stated legislative purpose of this administrative prerequisite was to balance the goal of efficiency encouraging settlement between the agency and the claimant with the desire to provide fair and equitable treatment of private individuals and claimants when they deal with the government or are involved in litigation with their government." *S. Rep. No. 1327, 89th Cong. 2d Sess. 2, reprinted in USC CAN 2515, 2516*, cited from *Santiago-Ramirez v. Secretary of Department of Defense, 984 F 2d 16, 18 (1st Cir. 1993)*.

Notably, the conduct on the part of the government employee in frustrating the administrative filing was in direct contradiction to the expressed intent of the statute.

Obviously, the discretionary function exception would not operate contradictory to the intended purpose of *2675*.

Defendant's request for dismissal should not have been granted on the basis of the discretionary function exception.

ARGUMENT III

BOTH THE COURT OF APPEALS AND THE DISTRICT COURT JUDGE ERRED REVERSIBLY IN SETTING ASIDE THE CLERK'S ENTRY OF DEFAULT AGAINST DEFENDANT JOHNSON AND DISMISSING COMPLAINT AGAINST THE SAME WITHOUT REQUIRING ANY RESPONSE BY THE DEFENDANT.

The sua sponte setting aside of the clerk's entry of default against the Defendant Johnson without her having to answer the complaint lodged against her by the plaintiff was contrary to fundamental fairness and equal protection under the United States Constitution, Fifth and Fourteenth Amendments.

In this connection, the answer of Defendant Johnson to plaintiff's complaint was necessary for the establishment of complaint in pro se theory of conspiracy involving the Defendants United States Postal Service and Wayne County Circuit and Friend of the Court.

It cannot be said in absence of response from Defendant Johnson and under the burden of perjury that Defendant Johnson would not have implicated the defendants (indirectly if not directly) by her answer. Instructively, the Courts have discouraged dismissal of in pro se complaints if there remains any possible theory for

sustaining the complaint. See e.g. *Mowrey v. Romero, 749 F Supp 1097 (MD FLA 1990); Koff v. Butterworth, 765 F Supp 716 (MD FLA 1991) and Meyer v. Curran, 397 F Supp 512 (DC PA 1975).*

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CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully Submitted,

/s/ MADISON ANDERSON

Madison Anderson
3831 Kendall Street
Detroit, Michigan 48238

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MADISON ANDERSON,
Plaintiff,

v. CASE NO. 98-CV-70937-DT

HONORABLE DENISE PAGE HOOD

MERLL JOHNSON,
UNITED STATES POSTAL
SERVICE, WAYNE
COUNTY CIRCUIT COURT
and WAYNE COUNTY
FRIEND OF COURT,
Defendants.
_____/

MEMORANDUM OPINION AND ORDER
(Filed July 31, 1996)

I. FACTS/BACKGROUND

This matter is before the Court on: 1) Defendant United States Postal Service's Motion to Dismiss; 2) Defendants Wayne County Circuit Court and Wayne County Friend of Court's Motion for Summary Judgment; and 3) Plaintiff's Request for Entry of Default against Defendant Merll Johnson.

Plaintiff filed the instant complaint pro se, alleging that Defendant United States Postal Service ("USPS")

participated in a conspiracy to force Plaintiff to pay child support to Defendant Johnson. The Plaintiff claims that the USPS damaged him through its non-action and/or malfeasance for failing to prosecute Defendant Johnson. The Plaintiff states that he observed Defendant Johnson take documents from his mailbox on February 12, 1991, and that he reported this incident to the USPS, but they did not prosecute Defendant Johnson.

The factual background regarding the relationship between the Defendant Johnson and the Plaintiff is important to the disposition of this motion. Defendant Johnson filed a paternity suit against Plaintiff on June 7, 1988 before the Wayne County Circuit Court, State of Michigan. The Plaintiff was served with the complaint, and a proof of service was filed with the Wayne County Circuit Court. A Pretrial Hearing was conducted on June 27, 1998. The Plaintiff did not appear at the Pretrial Hearing, and a Default Judgment was entered against him on August 4, 1988. The Notice of Default was mailed to the Plaintiff at his home, and a Default Judgment hearing was held on September 19, 1988. The Plaintiff did not appear at this hearing, and a Default Judgment and Order of Filiation was entered against him upon the recommendation of the Friend of the Court, and a finding that the Plaintiff had been served with the Notice of Hearing, and failed to appear.

In October 1988, the Plaintiff appeared at the Friend of the Court after receiving a child support payment book in the mail (the payment book was sent to the same address used to serve the Complaint). The Plaintiff informed the Court that his name was misspelled on the child support documents. The matter was then set for a Show Cause Hearing on January 4, 1989, after which, the Plaintiff was

ordered to pay child support.

On April 20, 1989, a Motion to Quash Service of Process, and to Set Aside the Default Judgment was filed on behalf of the Plaintiff. In that motion, the Plaintiff alleged that he had never been served with Merll Johnson's Complaint, and that he was not the father of Ms. Johnson's child. On May 2, 1989, the Plaintiff's motion was heard by a Referee, who ordered that the parties submit to a blood test. The blood test revealed that the probability of paternity was 99.98%. At a hearing on the merits of the Plaintiff's Motion to Set Aside the Default Judgment, the motion was denied, and the Plaintiff filed a motion for a de novo review by the Wayne County Circuit Court.

On January 1, 1990, an evidentiary hearing on the Plaintiff's motion was conducted, and the circuit court judge denied the Plaintiff's motion finding that Plaintiff failed to show that he had not been served with the paternity complaint. Plaintiff filed a claim of appeal. On appeal, the Plaintiff argued that he had been denied an opportunity to be heard at both the Pre-Trial Hearing, and the hearing on the entry of the Default Judgment. Plaintiff claimed this violated his Fifth and Fourteenth Amendment rights. Additionally, Plaintiff claimed that he had not been properly served with process, and the Default should be set aside because he was not the father of Ms. Johnson's child.

On May 16, 1991, the Court of Appeals entered an opinion affirming the decision of circuit court, upon its finding that Plaintiff failed to produce any evidence beyond his denial of service and, thus failed to meet his burden of proving non-service. The Michigan Supreme Court denied the Plaintiff's subsequent Application for

Leave to Appeal the decision, and the Motion for Reconsideration of his Application. The Plaintiff petitioned, and was denied certiorari to the United States Supreme Court, and the subsequent petition for an Extraordinary Writ on constitutional grounds was also denied. After his appeals were exhausted, Plaintiff, filed a Motion for Relief from the Default Judgment in the state court in 1993.

At the hearing on that motion, the Plaintiff argued that he had not been properly served with the paternity complaint, and that he had new evidence which confirmed that he was working at the time that the process server claimed to have served him with the complaint. At the conclusion of the hearing, the judge ruled that he was constrained from deciding whether the Plaintiff had been served with process because the issue had been decided in the earlier court proceeding, and that the Plaintiff was precluded from introducing any new evidence that was available to him at the time of the earlier hearing. The court also addressed the Plaintiff's allegations of fraud and theft, finding that these allegations could not support the Plaintiff's Motion for Relief from the Default Judgment, reasoning that since the Plaintiff claimed that Ms. Johnson's alleged misconduct occurred after the entry of the Default Judgment against the Plaintiff, the misconduct could not have been the basis for an entry of the Judgment against him. The Plaintiff once again appealed the circuit court decision.

On appeal, the Plaintiff again argued that he had been denied due process under the 14th Amendment because he never received service. The appeals court affirmed the decision of the lower court, and the Plaintiff again sought Leave to Appeal to the Michigan Supreme Court. The Michigan Supreme Court denied the request for

reconsideration, and the Plaintiff petitioned, and was denied review by the United States Supreme Court. The Plaintiff filed a Petition for Rehearing of the Petition for Writ of Certiorari with the United States Supreme Court, which was denied on February 18, 1997.

These are the facts and procedural history of this case which led to the Plaintiff's filing the instant action on March 8, 1998. Although Defendants Wayne County Circuit Court and Wayne County Friend of Court ("Wayne County Defendants") filed a Motion for Summary Judgment citing only Fed.R.Civ.P.12(b)(6), the Court will also consider the Wayne County Defendant's motion as a Rule 56 motion given the exhibits filed. Defendant USPS brought a Motion to Dismiss claiming Plaintiff failed to state a claim and that the Court lacks jurisdiction.

II. STANDARD OF REVIEW

To grant a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a district court must find that plaintiff can prove no set of facts in support of its claim that would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78S.Ct.99; 2 L.Ed.2d 80 (1957); Allard v. Weitzman (In re DeLorean Motor Co.), 991 F.2d 1236, 1240 (6th Cir. 1993); Meador v. Cabinet for Human Resources, 902 F.2d 474, 475 (6th Cir. 1990). When doing so, the court must interpret the complaint in the light most favorable to the plaintiff, accepting all of the factual allegations as true. Allard, 991 F.2d at 1240. The complaint need only give 'fair notice of what plaintiff's claim is and the grounds upon which it rests." Id. (citations omitted). Although this is a liberal standard, the plaintiff is required to assert more than legal conclusions: "In practice, 'a... complaint must contain either direct or inferential allegations respecting all

the material elements to sustain a recovery under some viable legal theory.'" Id. (citations omitted). See also City of Gainsville v. Florida Power & Light Co., 488 F.Supp. 1258, 1263 (S.D. Fla. 1980).

Where matters external to those specifically plead in the complaint are considered, the proper standard of review is one for summary judgment under Federal Rules of Civil Procedure 56. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In determining whether there are issues of fact requiring a trial "the inferences to be drawn from the underlying acts contained in the [affidavits, attached exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus., Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)(quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)). A "material" fact exists if there is a "dispute over facts that might affect the outcome of the suit." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248.

The moving party has the initial burden of showing that there is no genuine issue of material fact. Celotex Corp v. Catrett, 477 U.S. 317, 323; 106 S.Ct. 2548 (1986). Summary judgment must be entered if the nonmoving party failed to provide sufficient evidence on an essential element to that party's case on which that party will bear the burden

of proof at trial. Celotex, 477 U.S. at 322. The nonmoving party must present more than a mere scintilla of evidence and "may not rest upon the mere allegations or denials of his pleading, but...must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 249,252 (internal citation omitted). If the nonmoving party fails to present evidence that opposes the moving party, the evidence submitted by the moving party will be taken as true. Id, at 248-49.

III. ANALYSIS

A. Wayne County Defendants' Motion to Dismiss/Res Judicata

The Wayne County Defendants argue that the instant Complaint alleges the same facts and circumstances that have been advanced in the state court proceedings. On the basis of the prior decision in the state courts, the Plaintiff's Complaint should be dismissed on the grounds of res judicata. The Wayne County Defendants argue that though the instant complaint is couched in constitutional language, the basis of the Plaintiff's allegations are that the Filiation Order and Default Judgment were wrongfully entered against him, and that he has been deprived of his property without a hearing on the paternity action, or the opportunity to prove he did not receive notice of the Filiation Order.

The Wayne County Defendants note that it is well settled that a federal court must give the same preclusive effect to a state court judgment as would be given that judgment under the law of the state in which the judgment was rendered. Smith Hinchman and Grylls, Assoc., Inc., v. Tassic, 990 F.2d 256,257 (6th Cir. 1993).

Federal courts look to state law to decide the effect of the state proceedings. In Michigan, res judicata bars a claim or precludes re-litigation of an issue if: (1) the prior action was decided on the merits; (2) the issues raised in the second case either were resolved in the first, or through the exercise of reasonable diligence might have been raised and resolved in the first case; and (3) both actions involve the same parties or their privies. Id, at 257-58.

In support of this position, the Wayne County Defendants cite a Sixth Circuit unpublished opinion, Robinson v. Fiedler, 91 F.3d 144 (6th Cir. 1996). According to the Wayne County Defendants' reading of the case, the absence of a father at a paternity hearing does not render a Filiation Order invalid when the father had notice, and nonetheless failed to attend the hearing. The court found that the Filiation Order was a final decision on the merits and barred re-litigation of the circumstances of and/or validity of its entry. The Wayne County Defendants argue that on the basis of Robinson, the Plaintiff should be barred from re-litigating the Filiation Order and the circumstances surrounding its entry in federal court.

The Wayne County Defendants also argue that the fact that Plaintiff's federal action includes parties that were not present in the state proceedings and/or legal theories which were not advanced in the state proceeding would not preclude the application of res judicata. The Wayne County Defendants note that the same issues that were disposed of in the state court proceedings, are raised in the instant complaint. The Plaintiff alleges the additional theories of conspiracy and/or a violation of constitutional rights, and has added parties. The Wayne County Defendants argue that despite the additional theories and parties, the Plaintiff's Complaint should be dismissed, citing

Employers Insurance of Wausau v. Napier, 74 F.3d 1240 (6th Cir. 1996)(unpublished).

In Napier, the Sixth Circuit rejected the Plaintiff/Appellant's arguments that the federal action did not involve the same parties. In that case, the defendant/parents filed a complaint against a hospital which named the plaintiff/insurance company as an entity known to have potential subrogation rights. A settlement was reached in the case, and the plaintiff/insurance company filed a motion to intervene, but the motion was denied. After an appeal, the denial of the motion was affirmed by the Sixth Circuit. The plaintiff/insurance company then filed suit in federal court alleging breach of contract against the defendant/parents.

On the basis of the state court proceedings, the district court dismissed the case on grounds of res judicata, and plaintiff/insurance appealed. On appeal, the Sixth Circuit reviewed the pleadings in the state court proceedings, and rejected the plaintiff's argument that the same parties were not involved in the federal action. The court ruled that "the fact that the parties might bear different procedural labels in each action, or that additional claims or parties were also involved in the prior action, is of no moment." Id. at 5. The court further ruled that the fact that different parties are involved did not preclude a finding that plaintiff's action was barred. The Court also rejected the plaintiff's argument that the same action was not involved because the federal claim involved breach of contract, finding that the plaintiff relied upon the same contract provision in both actions. The Court found that when it looked behind the pleadings, the plaintiff was seeking the same relief in federal court that it sought in state court. Id.

The Wayne County Defendants argue that Plaintiff's federal lawsuit is the same action that was involved in the state proceedings. Plaintiff relies on the same facts and circumstances in support of his federal case. The Plaintiff seeks the same relief. The Wayne County Defendants' claim that his lawsuit is barred by res judicata.

Recognizing that the Plaintiff is pro se, it is necessary to give leniency with regard to the Plaintiff's pleadings. Federal courts hold the pro se complaint to a "less stringent standard" than those drafted by attorneys. Haines v. Kerner, 404 U.S. 519 (1972). However, the Plaintiff's response does not address all the arguments that the Wayne County Defendants raise as justification for the granting of their Motion to Dismiss. The first argument raised by the Plaintiff is that the Wayne County Defendants' motion is premature under Fed.R.Civ.P 56(c), because there have been no depositions, interrogatories, admissions, or affidavits taken in this case.

Secondly, the Plaintiff argues that res judicata/collateral estoppel is not applicable to this case. The Plaintiff notes in the Wayne County Circuit Court case, Merll Johnson v. Madison Anderson, because default judgment was entered against Plaintiff in that case, he has never litigated the merits of the case, foreclosing him from litigating any issue. The Plaintiff states that res judicata has four elements: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the cause of action. Sanders Confectionary Prod. Inc., v. Heller Fin., Inc., 973 F.2d 474,480 (6th Cir. 1992), cert denied 506 U.S. 1079; 113 S.Ct. 1046 (1993). The Plaintiff argues that res judicata is

inapplicable because elements three and four have not been met.

The res judicata effect of state court judgments in federal courts is governed by 18 U.S.C. § 1738, which requires the federal court to look to state court law of res judicata. "It is now well settled that a Federal Court must give to a State Court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." Migra v. Warren City School Dist., 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984). Therefore, the Court must look to Michigan law to decide the effect of the state proceeding.

Under Michigan Law, the doctrine of res judicata precludes collateral attack if: (1) the prior action was decided on the merits; (2) the issues raised in the second case either were resolved in the first, or though the exercise of reasonable diligence might have been raised and resolved in the first case; and (3) both actions involved the same parties or their privies. Reithmiller v. Blue Cross & Blue Shield of Michigan, 824 F.2d 510 (6th Cir. 1987).

These elements are met in this case. There have been at least nine hearings regarding the circumstances surrounding the Default Judgment and Filiation Order entered against the Plaintiff, all of which upheld the circuit court's Entry of Default Judgment. The Plaintiff has pursued this case in all the state courts of Michigan as well as the United States Supreme Court. Contrary to the Plaintiff's arguments, the doctrine of res judicata applies to default judgments and consent judgments as well as to judgment derived from contested trial. Plaintiff had full opportunity to

litigate the merits of the case, including the filiation and child support issues, before the Wayne County Circuit Court. Matter of Estate of Cook, 155 Mich. App. 604, 609; 400 N.W.2d 695, 697 (1986).

The issue of the Plaintiff's paternity, the theft of the Plaintiff's mail, fraud, and non-service, were raised and fully argued in the state court proceedings. The factual circumstances surrounding the Plaintiff's allegations in the instant Complaint, were the same facts alleged in the state court proceedings. The Michigan courts' decision consistently rejected Plaintiff's claim. The Plaintiff would like this Court to engage in a simple comparison of pleadings to determine if the same issues have been raised. By simple comparison, the claims are facially distinct. However, a simple comparison of the pleadings does not sufficiently flush out whether the same claims are at issue, therefore the Court must look beyond the pleadings. Mattingly v. Citizens Fidelity Bank and Trust Co., No. 86-5192 (6th Cir. September 24, 1987)(unpublished per curiam). Mattingly involved a situation where the plaintiff had related cases in both the federal and state courts. The federal case was put on hold pending appellate resolution of the related state claims. The state court resolved the claims in favor of the defendant, who subsequently was granted dismissal on res judicata grounds. On appeal, the plaintiff claimed that the state court did not reach the merits of all of the issues before the federal court. After reviewing the pleadings in the case, the court concluded that the Kentucky Court of Appeals had clearly decided the issue.

Similarly, in this case, looking beyond Plaintiff's argument that his conspiracy claim is different from its Motion to Quash Service of Process, and Motion to Set Aside the

Default Judgment, it becomes clear that the underlying issues and factual basis are the same. That conspiracy claim is the same cause of action as the Motions filed in state court can be ascertained by examining the Michigan Courts' decisions in light of what the Plaintiff hopes to achieve through the instant action. In both cases, the Plaintiff seeks to have paid to him all money garnished from his pay in support of Defendant Johnson's minor child. The Plaintiff has been denied this relief in actions for relief from judgments in the Michigan Courts. To grant the relief requested in the instant action for conspiracy would in effect ovverrule the Michigan Courts' determination that the Default Judgment and Filation Order entered against the Plaintiff were proper.

Finally, contrary to the Plaintiff's assertions, the same parties are involved. "The fact that the parties bear different procedural labels in each action, or that additional claims or parties were also involved in the prior action, is of no moment." Napier, supra, at 5. The issue is not whether the additional Defendants were a named party to the Plaintiff's Motion to Set Aside Default Judgment and Order of Filation, but whether these Defendants acted against the interest of the Plaintiff in that case, and whether the Michigan courts ruled on those actions. Looking at those factors, it is clear that the same parties are involved. Therefore, the Plaintiff's Complaint against Defendants Wayne County Circuit Court and Wayne County Friend of Court is barred by res judicata and must be dismissed.

B. Defendant United States Postal Service's Motion to Dismiss

1. Administrative Claim

The Defendant USPS moves to dismiss the Plaintiff's complaint on several grounds. The Defendant USPS first argues that this Court lacks subject matter jurisdiction. USPS notes that the United States, as sovereign, cannot be sued without consent. United States v. Sherwood, 312 U.S. 584, 586 (1941). The United States as sovereign is immune from suit unless it has consented to be sued. Sherwood, 312 U.S. 584. A corollary to this doctrine of governmental immunity is that, when the United States consents to be sued, Congress may define the conditions under which suits will be permitted. Kendall v. United States, 107 U.S. 123, 125, 2 S.Ct. 277, 27 L.Ed. 437 (1882). Sovereign immunity extends to federal agencies. Heritage Hills Fellowship v. Plouff, 555 F.Supp. 1290, 1294 (E.D. Mich. 1983).

The Federal Tort Claims Act (FTCA), 26 U.S.C. §§ 136(b), 2671 et seq. constitutes a waiver of sovereign immunity to a variety of tort-based claims. The United States has imposed one condition upon its consent to be sued under the FTCA, and that requirement is that the plaintiff must present an administrative claim to the responsible federal agency prior to the initiation of the suit. 28 U.S.C. § 2675(a); Allen v. United States, 517 F.2d 1328 (6th Cir. 1975). The requirement in 28 U.S.C. § 2675(a) that an administrative claim be filed as a prerequisite to filing a civil action under the Federal Tort Claims Act and the two year statute of limitations prescribed by 28 U.S.C. § 2401(b) are valid conditions under which suits may be maintained under the statute. These conditions are jurisdictional requirements, not capable of waiver or subject to estoppel. Executive Jet Aviation, Inc., v. United States, 507 F.2d 508, 515 (6th Cir. 1974). The requirement that the plaintiff file an administrative claim is an absolute prerequisite to suit, and is not subject to equitable tolling. Garrett v. United States, 640 F.2d 24 (6th Cir. 1981)(per

curiam).

Defendant USPS argues that the only cited incident of alleged wrongdoing by USPS occurred on February 12, 1991. In order for the Plaintiff to comply with the administrative claim filing requirement, he would have had to file his administrative complaint by February 11, 1993. 28 U.S.C.§ 2401(b). The FTCA provides that a tort claim is forever barred unless it is presented in writing to the appropriate agency within two years after such claims accrues. The Defendant USPS argues that the Plaintiff failed to file a claim. In support of this argument, the Defendant attaches to his brief, as exhibit A, the declaration of Rosa Jones, a paralegal at the Chicago Field Office, United States Post Office. Ms. Jones indicates in her affidavit that it is her responsibility to log all complaints presented to the Law Department under the FTCA. After a review of the records, Ms. Jones indicates that there is no complaint on record, filed by the Plaintiff regarding the circumstances underlying the instant complaint. Therefore, the Defendant USPS argues that the Plaintiff failed to meet the requirements of the FTCA, for filing suit against the United States, and his complaint should be dismissed for lack of subject matter jurisdiction.

The Plaintiff responds to the Defendant USPS's Motion to Dismiss by first arguing that he met the administrative claim filing requirements within the two year period. The Plaintiff argues that under the flexible construction given to the notice requirements under 28 U.S.C. § 2675(a), the letter that the Plaintiff sent to the Postal Inspector informing him of the theft should be deemed sufficient to meet the requirements of the FTCA. Santiago-Ramirez v. Secretary of the Dept. of Defense, 984 F.2d 16, 19 (1st Cir. 1993). The Plaintiff also attempts to argue that the statute of

limitations has not run on his cause of action because the tortuous conduct of the Defendant USPS was "tantamount to a conspiracy impacting continuously upon the Plaintiff until this present time." In support of this argument, the Plaintiff cites Wehrman v. United States, 830 F.2d 1480, 1486 (9th Cir. 1987). In addition, the Plaintiff alleges that the statute of limitations has not run because the government did not issue a formal denial of his claims within six months of its making. The Plaintiff argues that as a result, he can wait indefinitely before filing suit. Pascale v. United States, 998 F.2d 186, 192-93 (3rd Cir. 1993).

The Department of Justice has promulgated regulations prescribing the manner of presenting an administrative claim under the Federal Tort Claims Act. 28 C.F.R. 142(a) provides that a claim is deemed to be presented when an executed Standard Form 95 is received and accompanied by a claim for money damages in a sum certain. The Sixth Circuit has held that 28 C.F.R. 14.2(a) is a valid regulation. Ianni v. United States, 457 F.2d 804 (6th Cir. 1972).

With respect to Plaintiff's argument that the statute of limitations on this claim has not run applying the "continuing harm" doctrine, the Court has reviewed the case cited by the Plaintiff, Wehrman v. United States, 830 F.2d 1480 (8th Cir. 1987). Wehrman involved a Plaintiff who sued the Veterans Administration hospital alleging medical malpractice over a period of years from 1962 to 1984. The Plaintiff was completely disabled by organic brain syndrome caused by an injury received in military service. From 1962 through 1984, the plaintiff received medical treatment from the Minneapolis Veterans Administration Medical Center (VA). Various VA physicians treated him over the years. The plaintiff appealed from a grant of summary judgment, claiming that his damages arising out

of the medical malpractice were not barred by the two year limitation period set forth in 28 U.S.C. § 2401(b), because the allegedly tortuous continuing treatment did not end until some time within two years prior to his complaint. The court of appeals vacated the decisions of the district court and remanded the case with respect to those claims based on the events occurring within two years before the date the plaintiff filed his administrative claim.

In Wehrman, the Eighth Circuit recognized that tort claims against the United States are time barred if not presented in writing to the appropriate federal agency within two years after such claim accrues. When a claim accrues is a question of federal law. Snyder v. United States, 717 F.2d 1193, 1195 (8th Cir. 1983). In general, a claim accrues at the time of the plaintiff's injury, but medical malpractice cases are an exception to this rule. Id. The courts have focused on "determining the time [plaintiff] actually knew, or in the exercise of reasonable diligence should have known, the cause and existence of his injury." Snyder, 717 F.2d at 1195.

The facts of Wehrman are not analogous to the facts of this instant case. This is not a medical malpractice case. Plaintiff alleges that he notified the Postal Inspector that he saw the Defendant Johnson rifling through his mailbox on February 12, 1991. That was the date of the Plaintiff's alleged injury. Any administrative claim should have been filed by February 11, 1993. Defendant did not timely file a claim.

Plaintiff's argument that he has an indefinite amount of time in which to file his lawsuit, because the government failed to formerly deny his claim within six months must also

fail. Plaintiff has failed to present any evidence that he filed an administrative claim with the correct agancy within two years of the alleged tort.

This Court also lacks jurisdiction over this cause of action against the Federal Defendant because the Plaintiff failed to submit a proper administrative claim to the Postal Service as required by 28 U.S.C. § 2401(b). The Plaintiff has not presented any evidence that he submitted the Standard Form 95 within the two year period. The Plaintiff suggests that this Court should employ a lenient standard when assessing whether the Plaintiff meets the administrative claim filing requirements, citing Santiago-Ramirez, supra, 984 F.2d 16. Many circuits, including the Sixth Circuit recognize that the statutory notice requirement of § 2675 coincides with the presentment requirement in 28 C.F.R. § 14.2(a): "an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain..." The presentment requirements of the regulation and the notice requirement of the statement overlap except that the regulations also require additional information which is only relevant for settlement purposes. The Circuits have recognized that the additional information is not relevant for notice purposes, making a distinction between presenting a claim in a § 2675

context and presenting a claim for settlement.[1] Only after the process of settlement has been initiated does the additional information required by the regulations become relevant. All that is needed for notice is what the statute specifies. Plaintiff satisfies the notice requirement of § 2675 if he or she provides a claim form or "other written notification" which includes (1) sufficient information for the agency to investigate the claims, and (2) the amount of damages sought. Lopez, 758 F.2d at 809-10. This flexible approach to the notice requirement is in keeping with the original purpose behind the filing of an administrative claim: that of allowing the efficient investigation of a claim by the agency without sacrificing the entitlement of a claimant to his or her cause of action against the government. In the context of § 2675, the emphasis is on the agency's receipt of information. The agency must have enough information to reasonably begin an investigation of the claim. Santiago-Ramirez, 984 F.2d at 19.

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[1]Lopez v. United States, 758 F.2d 806 (1st Cir. 1985); GAF Corp. v. United States, 818 F.2d 901, 919 (D.C. Cir. 1987); Johnson v. United States, 788 F.2d 845, 848 (2nd Cir.), cert denied, 479 U.S. 914, 107 S.Ct. 315, 93 L.Ed.2d 288 (1986); Tucker v. United States Postal Serv., 676 F.2d 954, 959 (3rd Cir. 1982); Adams v. United States, 615 F.2d 284, 288-89 (5th Cir. 1980); Douglas v. United States, 658 F.2d 445, 447 (6th Cir. 1981); Charlton v. United States, 743 F.2d 557, 561 (7th Cir. 1984); Farmers State Sav. Bank v. Farmers Home Admin., 866 F.2d 276 (8th Cir. 1989); Warren v. United States Dep't of Interior Bureau of Land Management, 724 F.2d 776, 780 (9th Cir. 1984); Bush v. United States, 703 F.2d 491, 494 (11th Cir. 1983).

Applying the lenient notice requirements outlined above, the Plaintiff's Complaint must still be dismissed. The Plaintiff attaches two exhibits to his Response to the Defendant's Motion to Dismiss. Both documents are dated months after the two statutes of limitations had run. The first document, addressed to Congresswoman Barbara Rose Collins, is dated August 10, 1993. The second document, addressed to the United States Postal Inspector, is dated September 7, 1993. Both of these dates are well beyond the February 11, 1993 date the administrative claim should have been filed.

Since the evidence indicates that no timely administrative claim was ever made with regard to the claimed damages, the Court grants Defendant USPS's Motion to Dismiss Plaintiff's Complaint for lack of jurisdiction.

2. Discretionary Function Exception

The Defendant USPS next argues that the discretionary function exception to the FTCA applies to bar the Plaintiff's complaint. The Defendant argues that the Plaintiff's claim do not state a compensable claim under the FTCA. The decision to investigate is a discretionary function which is exempted from tort liability by 28 U.S.C. § 2680(h); Sutton v. United States, 819 F.2d 1289, 1294 (5th Cir. 1987).

The Plaintiff argues that the discretionary function exception of the FTCA is "designed to prevent judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." United States v. Varig Airlines, 467 U.S. 797, 814 (1984). To determine if the discretionary function applies, courts must apply a two-

part inquiry. The court must consider: (1) whether the action is a matter of choice for the acting employee; and (2) the court must determine whether the element of judgment involved "is of the kind that the discretionary function was designed to shield." Berkovitz v. United States, 486 U.S. 531, 536 (1988). The focus is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and whether they are susceptible to policy analysis. United States v. Gaubert, 499 U.S. 315, 326 (1991).

The FTCA is a general waiver of the sovereign immunity of the United States government to suit in the federal courts. It was designed to "afford easy and simple access to the federal courts for persons injured by the activities of government" without the need to resort to private bills for the purpose of obtaining compensation. Collins v. United States, 783 F.2d 1225, 1233 (5th Cir. 1986). However, there are numerous exceptions and provisos to the waiver found in § 2680. This case involves the discretionary function exception found at § 2680(h), more commonly known as the "law enforcement proviso." This amendment relinquished the previously retained sovereign immunity against claims arising out of these enumerated torts if the claim resulted from the act or omission of an investigative or law enforcement officer of the United States government. Congress knew that existing law provided that decisions on when, where, and how to investigate and whether to prosecute were considered discretionary at the time Congress amended § 2680(h). United States v. American Trucking Associations, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940).

The determination of whether the discretionary function exception bars a suit against the government is guided by

several established principles. The Supreme Court in Varig, stated that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." Varig, 467 U.S. at 813. In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. Dalehite v. United States, 346 U.S. 14,34,73S.Ct.956,967,97L.Ed.1427(1953)(overruledonother grounds). The discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a court of action for an employee to follow. In that event, the employee has no rightful option but to adhere to the directive. If the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. Westfall v. Erwin, 484 U.S. 292,296-97,108 S.Ct 580(1988).

Assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. When property construed, the exception protects only governmental actions and decisions based on considerations of public policy. Dalehite, 346 U.S. at 36. Therefore, the discretionary function exception insulates the government from liability if the action challenged in the case involves the permissible exercise of policy judgment. Berkovitz, 486 U.S. at 537.

The decision whether to investigate an alleged crime is

a discretionary function, because it is the product of judgment and choice. Westfall, 484 U.S. at 296-97. The postal inspector decided, based upon the information available to him at the time, not to do any further investigation or to prosecute the Defendant Johnson based upon the Plaintiff's allegations. The decision whether or not to investigate an alleged crime is a discretionary function, therefore, the discretionary function exception requires the dismissal of any tort claim against Defendant USPS.

3. 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1334, and the 14th Amendment

Finally, the Defendant USPS argues that this Court has no jurisdiction under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343[2] or the Fourteenth Amendment. The Defendant argues that § 1983 requires that the complained of action be taken under the color of state law. To establish a claim under § 1983, a plaintiff must prove that (1) there was a violation of a right secured by the Constitution and the laws of the United States; and (2) that the alleged deprivation complained of was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42,48(1988). The USPS and its employees act under color of federal law not state law, therefore, this case is not actionable under § 1983.

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[2]28 U.S.C. §§ 1331 and 1334 are jurisdictional statutes and do not provide a plaintiff with separate causes of action.

As for the Plaintiff allegations of violations of the Fourteenth Amendment, the Defendant argues that the United States possesses sovereign immunity from suit for money damages except to the extent that it expressly consents to suit. Dalehite, 346 U.S. at 30. In this instance, the United States has not waived immunity for money damages, therefore, the Plaintiff's claim is barred by sovereign immunity. Ashbrook v. Block, 917 F.2d 918, 924 (6th Cir. 1990). Sovereign immunity extends to federal agencies. Heritage Hills Fellowship, 555 F.Supp. at 1294. In the case of the Plaintiff's constitutional claims, agencies of the federal government cannot be sued, unless Congress authorizes the suit in explicit language. Blackmar v. Guerre, 342 U.S. 512, 515 (1952). To date, Congress has not authorized suit suits for money damages against the Post Service, therefore, the Plaintiff's constitutional claim against the Defendant USPS will be dismissed because it is not cognizable. Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 483-86 (1994).

The Plaintiff responds by arguing that there is an exception to the government's claim of sovereign immunity and the argument of the government that the USPS was acting under color of federal law not state law. The Plaintiff argues that there is a recognized exception to these rules of law when a federal agency joins with a state agency in a conspiracy to act under color of state law. Whittington v. Milby, 928 F.2d 188 (6th Cir. 1991); Bier v. Fleming, 717 F.2d 308 (6th Cir. 1983). "The ultimate issue in determing whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment; is the alleged infringement of federal rights 'fairly attributable to the state?'" Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764,2770,73 L.Ed.2d 418(1982). There must be a sufficiently close nexus

between the state and the conduct challenged so that defendant is treated as a state actor and defendant's act is treated as that of the state. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351,95 S.Ct.449, 453,42 L.Ed.2d 477(1974). The party charged must be a state official, or he must have acted together with or received significant aid from state officials, or his conduct otherwise must be chargeable to the state. Id.

The Supreme Court has developed the so-called nexus test to determine whether conduct of a private actor is fairly attributable to a state. Under this test, a finding of state action may be made when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the later may be fairly treated as that of the State itself." Id. at 351. Under this approach, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." Id. at 350. It must be demonstrated that the State is intimately involved in the challenged private conduct in order for that conduct to become attributable to the state for purposes of § 1983 action.

The required nexus may be established by showing that the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173-73,92 S.Ct.1965, 1971,32 L.Ed.2d 627(1972). A nexus may also be established if the private entity has exercised powers that are "traditionally the exclusive perogative of the State." Jackson, supra, 419 U.S. at 353.

Analyzed in the light of these considerations, the Court

can only conclude that there has been no showing of state action on the part of Defendants USPS and Johnson. The federal government cannot reasonably be characterized as a "private entity" for the purposes of the state action analysis. The Plaintiff has made no showing that the Defendants were involved in a conspiracy. There has been no evidence that anyone would benefit from this alleged conspiracy. There is no evidence that these Defendants acted in concert to deprive the Plaintiff of his rights. This Court must dismiss the Plaintiff's claims against the USPS under § 1983, because the required element of acting under color of state law is lacking.

As for the Plaintiff's claims of violation of his 14th Amendment rights. It must first be noted that the Plaintiff raised this claim in the state court proceedings, and the issue was decided against him. The Fourteenth Amendment's guarantee of equal protection of the law is, as with § 1983, not available in a claim against the federal government. Walber v. United States Dept. Of Housing and Urban Development, 897 F.2d 530(1990)(unpublished decision); Taylor v. United States, 320 F.2d 843, 846 (9th Cir. 1963), cert. denied, 376 U.S. 916 (1964). Therefore, the Plaintiff's claimed violation of his Fourteenth Amendment rights must be dismissed.

C. Defendant Johnson

On June 4, 1998, Plaintiff filed a request for a clerk's entry of default as to Defendant Johnson. On June 5, 1998, the Clerk entered a default against Defendant Johnson for failure to appear in this matter pursuant to Fed.R.Civ.P.55(a). Plaintiff has not filed a written motion for default judgment against Defendant Johnson in this matter. Other than Defendant Johnson, the parties and

the Court have had an opportunity to consider the merits of Plaintiff's Complaint. Generally, on a motion for entry of default judgment pursuant to Rule 55(b)(2), allegations of fact in the complaint are taken as true unless they are contradictory on the face of the document. Thompson v. Wooster, 114 U.S. 104 (1885); Kelly v. Carr, 567 F.Supp. 831,840 (W.D. Mich. 1983). Facts are not established by the pleadings or claims which are not well-pleaded, are not binding and cannot support a judgment. Kelly, 567 F.Supp. at 840. Even if a default has been entered against a party, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law. Id.; Pacheco v. Morales, 953 F.2d 15, 16(1st Cir. 1992). Fed.R.Civ.P.55(b)(2) permits a court, in its own discretion, after a hearing, to "establish the truth of any averment" in the complaint. Pacheco, 953 F.2d at 16. Here, a hearing was held on the matter addressing the "truth" to Plaintiff's Complaint.

Based on the above analysis on Plaintiff's claims against the Wayne County Defendants and Defendant USPS, the Court finds that Plaintiff has failed to state a claim against Defendant Johnson as well. For the same reasons set forth above, res judicata bars any claim by Plaintiff against Johnson. The issues of paternity and child support have been litigated on their merits before the Wayne County Circuit Court.

As to a Section 1983 claim against Defendant Johnson, there is no evidence that Defendant Johnson is a state actor. Two elements are essential to a claim under Section 1983: 1) the conduct complained of must be committed under color of state law; and 2) the conduct must have deprived claimant of a right, privilege or immunity

protected by the United States Constitution or statutes. Paratt v. Taylor, 451 U.S. 527,535 (1981). Here, the Complaint alleges that Defendant Johnson is an "individual." (Complaint, ¶ III) There is no allegation that Defendant Johnson was acting under color of state law. Additionally, for the reasons set forth above, there has been no showing that Defendants Johnson and USPS acted in concert to deprive Plaintiff of any constitutional or statutory rights. The Court sets aside the Clerk's entry of default as to Defendant Johnson and dismisses the Complaint against Defendant Johnson for failure to state a claim.

III. CONCLUSION

For the reasons set forth above, the Complaint is dismissed against all of the Defendants.

Accordingly,

IT IS ORDERED that Defendant United States Postal Service's Motion to Dismiss the Complaint **(Docket No. 5, filed May 4, 1998)** is GRANTED.

IT IS FURTHER ORDERED that Defendants Wayne County Circuit Court and Wayne County Friend of Court's Motion for Summary Judgment **(Docket No. 6, filed May 18, 1998)** is GRANTED.

IT IS FURTHERED ORDERED that the Clerk's Entry of Default is SET ASIDE as to Defendant Merll Johnson.

IT IS FURTHER ORDER that the Complaint against all Defendants is DISMISSED with prejudice.

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

Dated: July 31, 1998

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MADISON ANDERSON,
Plaintiff,

CASE NO. 98-CV 70937-DT

v.

HONORABLE DENISE PAGE HOOD

MERLL JOHNSON, UNITED STATES POSTAL SERVICE, WAYNE COUNTY CIRCUIT COURT and WAYNE COUNTY FRIEND OF COURT,

Defendants.
_____/

JUDGMENT

(Filed July 31, 1998)

In accordance with the Memorandum Opinion and Order entered this date and the Court having entered an order granting Defendants' Motions to Dismiss and dismissing this action with prejudice;

Accordingly, judgment is entered in favor of Defendants and against Plaintiff.

/s/ JOHN P. MAYER
JOHN P. MAYER
CLERK OF COURT

Approved:

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge
Dated: July 31, 1998
Detroit, Michigan

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-1931

MADISON ANDERSON,
Plaintiff-Appellant,

-vs-

MERLL JOHNSON, UNITED STATES POSTAL SERVICE, WAYNE COUNTY CIRCUIT COURT, WAYNE COUNTY FRIEND
OF THE COURT,
Defendants-Appellees.

Appeal From the United States District Court
For the Eastern District of Michigan
Southern Division

SUPPLEMENT TO THE JOINT APPENDIX

MADISON ANDERSON
Plaintiff In Pro Se
3831 Kendall
Detroit, MI 48238

DOCUMENTS/DESIGNATION SUPPLEMENT

PLEADINGS - DOCUMENTS

R1 - R31	PROVIDED BY DEFENDANT APPELLEE UNDER DESIGNATION OF RECORD (JOINT APPENDIX)
R32	DETROIT POLICE PRELIMINARY COMPLAINT RECORD 2-12-91
R33	POSTAL INSPECTOR RESPONSE TO PLAINTIFF'S TELEPHONE CONTACT ON 4-25-91
R34	PLAINTIFF'S LETTER TO CONGRESSWOMAN BARBARA ROSE COLLINS 8-10-93
R35	CONGRESSWOMAN BARBARA ROSE COLLINS REPLY TO PLAINTIFF'S LETTER OF 8-10-93 ON 8-31-93
R36	PLAINTIFF'S LETTER TO UNITED STATES POSTAL INSPECTOR'S 9-7-93, ATTENTION OF RICKY DODD
R37	PETITION TO ADD NAME OF PERSON OMITTED IN TRANSCRIPT
R38	OPPOSITION OF UNITED STATES POSTAL SERVICE TO PLAINTIFF'S PETITION TO ADD NAME TO TRANSCRIPT

R 32
DETROIT POLICE PRELIMINARY COMPLAINT RECORD
February 12, 1991

Place of Occurrence: 3831 Kendall
Type of Building: Apartment Complex
Person Reporting Offense: Complainant
Complainant: Madison Anderson
Address: 3831 Kendall
Method of Entry: Outdoor Mailbox
Method of Escape: In Vehicle
No. Of Perps. 1
Describe Sex: Female
Juvenile or Adult: Adult
Race: Black
Perpetrator Relationship: Acquainted
Perp: Merll Mable Johnson/BF 46/5'6"/Med Build/Drk Complx.
Source: Compl TX TCRS
Circum: Perp took letters from the complainant's mailbox as complainant watched and then fled in vehicle.
Taken: Unknown number of U.S. mail letters, contents unknown.
Witnesses: Complainant
Perp's Vehicle: Small silver car poss a Dodge Omni/Lic Plate 666— or —666 MI
Reporting Officer: Robert Grant
Badge: CS431
Supervisor's Signature: /s/ Manuel Racknet, Jr.
Rank: Sgt.

R33
POSTAL INSPECTOR
P.O. Box 330119
Detroit, MI 48232-6119

[per your phone request on 4/25/91. Contents of which was sent to Ms. Johnson.]

RE:

Complainant has been received at this office regarding the alleged obstruction of correspondence. Obstruction of Correspondence, Title 18, United States Code, Sections 1701 and 1702, is a Federal violation and prosecutable offense.

Title 18, United States Code, Sect. 1701 - Obstruction of Mails General

Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than $100 or imprisoned not more than 6 months, or both.

Title 18, United States Code, Sec. 1702 - Obstruction of Correspondence

Whoever takes any letter, postal card, or package out of any letter office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in the post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with designs to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes,

embezzles, or destroys the same shall be fined not more than $2,000 or imprisoned not more than 5 years, or both.

You are hereby requested to return the mail to your letter carrier for forwarding to the proper addressee.

This letter is submitted as information.

Sincerely,
Postal Inspector
(313) 226-8249

R34

Madison Anderson
3831 Kendall
Detroit, MI 48238

August 10, 1993

Congresswoman Barbara Rose Collins
1108 Longworth H.O.B.
Washington, D.C. 20515

Dear Congresswoman Collins:

This letter is in regard to a request that I made to the Postal Service for an investigation of mail theft. On February 12, 1991, I reported this crime to the police department which was the same day that it occurred. The officer advised me that it was a matter for the postal inspectors department although I was able to get a report made by the police department, see attached.

Around March 1, 1991, after many attempts, I was able to contact a Mr. John Allsteader in the postal inspectors department who sent a copy of Section 1701 and 1702 to Ms. Johnson, the person I saw taking my mail. Also, I have talked with a Mr. Art VanDeparitti and a Mr. Roberts. I have not been successful in contacting Mr. Wilson or Mr. Carl January. I am now asking for your assistance in getting this matter investigated.

Thank you in advance for your help in this matter.

Very truly yours,

/s/ MADISON ANDERSON
MADISON ANDERSON

Attachment

App. 38

Certified Mail#: P 244 446 312, Dated: August 12, 1993

R35

U.S. HOUSE OF REPRESENTATIVES
Committee on Post Office and Civil Service
Subcommittee on Postal Operations and Services
406 Cannon House Office Building
Washington, DC 20515-6246

Telephone: (202) 225-9124

August 31, 1993

Mr. Madison Anderson
3831 Kendall
Detroit, MI 48238

Dear Mr. Anderson:

This is to acknowledge receipt of your letter dated August 10, 1993 to Congresswoman Barbara-Rose Collins, Chairwoman of the Postal Operations and Services Subcommittee.

Your concerns are very important to Congresswoman Collins, and I assure you they will be fully investigated and responded to as expeditiously as possible.

If you have any questions, please contact me at (202) 225-9124.

Sincerely,

/s/ KENNETH J. McGHIE
KENNETH J. McGHIE
Deputy Staff Director

App. 40

R36
3831 Kendall
Detroit, MI 48238

September 7, 1993

United States Postal Inspectors
475 L'Ensant Plaza W, South West
Room 3141
Washington, D.C. 20260-2166

ATTN: Ricky Dodd

Dear Mr. Dodd, Manager of E.C. & I.C.

On August 18 and 24, 1993, I spoke with you by telephone regarding an investigation of mail theft that occurred on February 12, 1991. On August 24, 1993 you informed me that you had contacted someone at the main post office in Detroit. I assume it was Mr. Art VanDeparitti since he was the person you said you were going to speak with when I spoke with you on August 18, 1993.

Also, I would like to know if it is within your authority to order an investigation. I am looking forward to hearing from you very soon in regard to this matter.

Sincerely,

/s/ MADISON ANDERSON
MADISON ANDERSON

Certified Mail#: P 244 446 652, Dated September 17, 1993

U.S. Department of Justice
United States Attorney
(313) 226-9790 Eastern District of Michigan
211 W. Fort Street
Suite 2001
Detroit, Michigan 48226

October 16, 1998

Mr. Madison Anderson
3831 Kendall Street
Detroit, MI 48238

Re: Anderson v. Johnson, et al.
Civil No. 98-70937

Dear Mr. Anderson:

Enclosed is a file-stamped copy of an Opposition of United States Postal Service to Plaintiff's Petition to Add Name to Transcript in reference to the above-entitled action.

Very truly yours,
SAUL A. GREEN
United States Attorney
/s/ MARY S. RIGDON
MARY S. RIGDON
Assistant U.S. Attorney

MSR:br
Enc.
cc: (w/enc.) Thomas E. Marshall; Janice L. Williams-Jones.

R37

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MADISON ANDERSON,
Plaintiff,

vs. No. 98-CV-70937
Honorable Denise Page Hood

MERLL JOHNSON, UNITED STATES POSTAL SERVICE, WAYNE COUNTY CIRCUIT COURT, 3RD CIRCUIT AND WAYNE COUNTY FRIEND OF COURT, jointly and severally,
Defendants.
_____/

Madison Anderson
In Pro Per
3831 Kendall Street
Detroit, MI 48238
(313) 883-3610

Mary S. Rigdon, (P-42637)
Asst. U.S. Attorney
211 W. Fort St., Suite 2300
Detroit, MI 48226
(313) 226-9790
Attorney for Defendant
U.S. Postal Service

Janice Williams-Jones
Lewis & Monday, P.C.
1300 First National Building
Detroit, MI 48226
(313) 961-2550
Attorney for Defendants, Wayne County Circuit Court, 3rd Judicial Circuit and Friend of the Court

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PETITION TO ADD NAME OF PERSON OMITTED IN TRANSCRIPT

Now comes Madison Anderson, Plaintiff in Pro per, as petitioner requesting the court to grant his Petition to Add Name of Person Omitted in the Transcript, for the following reason(s):

1. That on July 27, 1998, a hearing was conducted before this Honorable Court based on United States Postal Services Motion to Dismiss and the Wayne County Circuit Court and Friend of the Court's Motion for Summary Judgment.

2. The above hearing was recorded by mechanical stenography and produced by computer-aided transcription, Sheri K. Ward, RPR, Court Reporter.

3. That following this Court's Granting of United States Postal Services Motion to Dismiss and the Wayne County Circuit Court and Friend of the Court's Motion for Summary Judgment, the Plaintiff, Madison Anderson filed his Appeal and ordered a transcript of the proceedings.

4. On September 11, 1998 past 3:30 P.M., Plaintiff-Petitioner was called by Sheri K. Ward advising him she did not hear or understand all of his arguments made at the hearing of July 27, 1998.

5. An appointment date of September 14, 1998 was scheduled between the Plaintiff-Petitioner and court reporter, Sheri Ward, for the purpose of completing the transcript with the necessary additions and corrections being made.

6. Prior to arrival on September 14, 1998, the Plaintiff-Petitioner was contacted again by Court Reporter,

Sheri Ward and asked to bring letter from the Post Office and a copy of the police report reporting the activity of one of the defendants, Merll Johnson.

7. Upon Plaintiff-Petitioner's arrival at the office of Court Reporter, Sheri Ward, he was advised by her that she did not need either his letter or police report. She inquired if Plaintiff-petitioner was reading from something during his argument (the Plaintiff-Petitioner's response was "No").

8. Shortly thereafter, the Court Reporter, Sheri Ward handed the completed transcript to the Plaintiff-Petitioner.

9. At the time of receiving the transcript from the Court Reporter, Sheri Ward, the Plaintiff-Petitioner inquired of the court reporter, if he found anything missing upon reading it would she make the corrections (the court-reporter, Sheri Ward's response was "Yes").

10. On September 15, 1998, the Plaintiff-Petitioner informed court reporter Ward that the name John Alsteader was used by him following the word superior (at page 10 of transcript).

11. The court reporter's response was that it was necessary for Plaintiff-Petitioner to petition the court and advise all parties involved in his request.

12. WHEREFORE, for reasons stated above, the Plaintiff-Petitioner requests that this Honorable Court Grant his petition to add the name of John Alsteader omitted from the transcript.

Respectfully,

/s/ MADISON ANDERSON

MADISON ANDERSON

R38

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MADISON ANDERSON,
Plaintiff,

v. Case No. 98-70937

MERLL JOHNSON, UNITED STATES Judge Denise Page Hood
POSTAL SERVICE, WAYNE COUNTY
CIRCUIT COURT, 3RD CIRCUIT AND
WAYNE COUNTY FRIEND OF COURT,
jointly and severally,

Defendant.
_____/

OPPOSITION OF UNITED STATES POSTAL SERVICE TO PLAINTIFF'S PETITION TO ADD NAME TO TRANSCRIPT

(Dated: October 16, 1998)

Defendant, United States Postal Service, opposes plaintiff's petition to add the name of John Alsteader on page 10 of the Transcript from the Hearing on the Motion to Dismiss before this court on July 27, 1998 (served on this defendant on October 5 and attached as Exhibit A), for the following reasons:

1. Plaintiff cannot demonstrate that any name was actually omitted from the transcript made by the Court

reporter from the tape of that date.

2. The name of John Alsteader does not appear in any of the documents previously filed with the court in this matter, and plaintiff cannot demonstrate that such an individual had any relationship to any of the events described in his complaint or in any of the other pleadings on which the court based its decision in this matter. Therefore, the addition of such a name would add nothing to the information needed by the Sixth Circuit Court of Appeals in order to decide plaintiff's appeal.

Wherefore, the federal defendant, United States Postal Service, opposes the proposed addition to the transcript.

Respectfully submitted,
SAUL A. GREEN
United States Attorney
/s/ MARY S. RIGDON
MARY S. RIGDON (P42637)
Assistant U.S. Attorney
211 W. Fort Street
Suite 2001
Detroit, MI 48226
(313) 226-9790

Dated: October 16, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MADISON ANDERSON,
Plaintiff,

v. Case No. 98-70937

MERLL JOHNSON, UNITED STATES Judge Denise Page Hood
POSTAL SERVICE, WAYNE COUNTY
CIRCUIT COURT, 3RD CIRCUIT AND
WAYNE COUNTY FRIEND OF COURT,
jointly and severally,

Defendant.
_____/

CERTIFICATION OF SERVICE

I hereby certified that a true and accurate copy of the Opposition of United States Postal Service to Plaintiff's Petition to Add Name to Transcript has this 16th day of October, 1998, been made upon the following:

Madison Anderson
3831 Kendall Street
Detroit, MI 48238

Thomas E. Marshall
Janice L. Williams-Jones
Lewis & Munday
660 Woodward Avenue
1300 First National Building
Detroit, MI 48226

by way of:
U.S. First Class Mail

/s/ BERYL A. ROBBINS
BERYL A. ROBBINS, Secretary
Office of the U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MADISON ANDERSON,
Plaintiff,

v. Case No. 98-CV-70937

MERLL JOHNSON, UNITED STATES POSTAL SERVICE, WAYNE COUNTY CIRCUIT COURT, 3RD CIRCUIT AND WAYNE COUNTY FRIEND OF COURT, jointly and severally, Honorable Denise Page Hood

Defendant.
_____/

Madison Anderson
In Pro Per
3831 Kendall Street
Detroit, MI 48238
(313) 883-3610

Janice Williams-Jones
Lewis & Munday, P.C.
1300 First National Building
Detroit, MI 48226
(313) 961-2550
Attorney for Defendants, Wayne County Circuit Court, 3rd Judicial Circuit and Friend of the Court

Mary S. Rigdon, (P-42637)
Asst. U.S. Attorney
211 W. Fort Street, Suite 2300
Detroit, MI 48226
(313) 226-9790
Attorney for Defendant, U.S. Postal Service

PROOF OF SERVICE

Madison Anderson certifies that on the ___ day of September, 1998, he served copies of Petition to Add Name of Person Omitted in Transcript upon Merll Johnson, _____, Detroit, MI 482__; Janice Williams-Jones, 1300 First National Building, Detroit, MI, Attorney for Defendants, Wayne County Circuit Court, 3rd Judicial Circuit, and Friend of the Court; Mary S. Rigdon, 211 W. Fort Street, Ste. 2300, Detroit, MI 48226, Attorney for Defendant U.S. Postal Service, by placing same in an envelope in a U.S. mail receptacle with certified first-class postage fully prepaid thereon.

I declare that the above statements are true to the best of my information, knowledge, and belief, MCR 2.114(A)(2)(b).

/s/ MADISON ANDERSON
MADISON ANDERSON

Subscribed and sworn to before me
this ___ day of September, 1998

_____
Notary Public
Wayne County, Michigan
My Commission Expires:

No. 98-1931
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MADISON ANDERSON,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
MERLL JOHNSON; UNITED STATES POSTAL SERVICE; WAYNE COUNTY CIRCUIT COURT; WAYNE COUNTY FRIEND OF THE COURT,	)	
	)	
Defendants-Appellees.	)	
	)	

Before: RYAN and COLE, Circuit Judges; WILHOIT, District Judge.*

(Filed November 4, 1999)

Madison Anderson, proceeding pro se, appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P.34(a).

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*The Honorable Henry R. Wilhoit, Jr., United States District Judge for the Eastern District of Kentucky, sitting by designation.

Seeking monetary and equitable relief, Anderson sued the United States Postal Service (USPS), the Wayne County Circuit Court, State of Michigan, the Wayne County Friend of Courts, and a private citizen (Johnson), essentially alleging that the defendants conspired to deprive him of the opportunity to challenge a paternity action or the state court orders finding him financially responsible for Defendant Johnson's child. Healleges that the defendants' conduct deprived him of his property interest in his salary. He also alleged that the USPS damaged him because it declined to prosecute defendant Johnson for taking mail from his mailbox in 1991.

By way of background, it is noted that defendant Johnson filed a paternity suit against Anderson in June 1988, before the Wayne County Circuit Court. The court eventually entered a default judgment against Anderson, as well as an order of filiation. Thereafter, Anderson filed a motion to quash service of process and to set aside the default judgment, arguing that he had never been served with Johnson's complaint and that he was not the father of Johnson's child. Anderson sought review in the Wayne County Circuit Court, arguing that he had been denied an opportunity to be heard and that he was not the father of her child. Following an evidentiary hearing the court concluded that Anderson had not shown that he had not been served with the paternity complaint. The Michigan court of Appeals affirmed the Circuit Court's judgment, and the Michigan Supreme Court denied Anderson's application for leave to appeal. Thereafter, the Circuit Court held a hearing on Anderson's motion for relief from the default judgment, during which the court addressed Anderson's allegations that Johnson had stolen mail from his mail box; the court denied Anderson's motion. The Michigan Court of Appeals affirmed the Circuit Court's

judgment, and the Michigan Supreme Court denied Anderson's application for leave to appeal.

Upon review, the district court entered a default judgment against defendant Johnson because she did not file a response to Anderson's complaint. Subsequently, the district court granted USPS's motion to dismiss for lack of administrative exhaustion, granted the Wayne County defendants' motion for summary judgment, and sua sponte set aside the entry of default against Defendant Johnson, as Anderson's claim against these two defendants is barred by the doctrine of res judicata.

I.

The district court properly dismissed Anderson's claim against the USPS pursuant to Fed. R. Civ. P. 12(b)(6). *See Volassis Communications, Inc. v. Aetna Cas. & Sur. Co.*, 97 F. 3d 870,873 (6th Cir. 1996). We construe Anderson's attempt to bring a § 1983 suit against the USPS as a claim under the FTCA. Anderson did not exhaust his administrative remedies prior to filing suit under the Federal Tort Claims Act. *See Lundstrum v. Lyng*, 954 F.2d 1142, 1145 (6th Cir. 1991).

Even if the court were to conclude that Anderson was entitled to equitable tolling regarding his administrative remedies, the district court properly concluded that Anderson's allegations do not state a compensable claim under the FTCA. Under the "discretionary function" exception, sovereign immunity is retained where the alleged negligence consists of flaws in the government's performance of a discretionary function or duty. *See Graves v. United States*, 872 F.2d 133, 137 (6th Cir. 1989). If the discretionary function exception applies, a dismissal

for lack of federal subject matter jurisdiction is appropriate. *See Rich v. United States*, 119 F.3d 447, 449 (6th Cir. 1997), cert. denied, 118 S.Ct. 1364 (1998). Here, the postal inspection service has discretion as to which alleged crimes it will investigate and prosecute. *See Sutton v. United States*, 819 F.2d 1289, 1294 (5th Cir. 1987). Hence, the exception would apply to this case.

We also conclude that the district court properly set aside the default judgment entered against Defendant Johnson. Even if a default has been entered against a party, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law. *See Quirindongo Pacheco v. Rolon Morales*, 953 F.2d 15, 16 (1st Cir. 1992). The district court properly concluded that Anderson's claim against Johnson is barred by the Michigan doctrine of res judicata, *see Smith, Hinchman and Grylls, Assoc., Inc. v. Tassic*, 990 F.2d 256, 257-58 (6th Cir. 1993). Because the essence of Anderson's claim has been presented and rejected in the prior state court proceedings, and because he has re-named Johnson as a defendant, the requirements for the application of res judicata have been satisfied.

II.

We affirm the district court's judgment granting summary judgment to the Wayne County defendants, but for reasons other than those stated by the district court. *See City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 251 (6th Cir. 1994).

The district court lacked jurisdiction over Anderson's claims against these defendants. Anderson essentially

alleged that these defendants improperly entered orders which caused him to be responsible for child support payments. He argued that the orders are invalid because he was denied the opportunity to be heard at the hearing, and that, as a result, he has been deprived of his property interest in his salary.

The district court lacked jurisdiction to review this aspect of Anderson's complaint, per the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine stands for the proposition that lower federal courts do not have jurisdiction to review a case litigated and decided in state court as only the United States Supreme Court has jurisdiction to correct state court judgments. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n. 16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *Gottfried v. Medical Planning Serv., Inc.*, 142 F.3d 326, 330 (6th Cir.), cert. denied, 119 S. Ct. 592 (1998); *Blanton v. United States*, 94 F.3d 227, 233-34 (6th Cir. 1996). This is equally true in constitutional cases brought under § 1983, since federal courts must give "full faith and credit" to the judicial proceedings of state courts. *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 85 (1984); *Gottfried*, 142 F.3d at 330. Under this doctrine it was improper for the federal district court to have exercised jurisdiction over this case, which is the functional equivalent of an appeal from the state court findings that he is the father of Defendant Johnson's child and that he is obligated to pay child support. *See Valenti v. Mitchell*, 962 F.2d 288, 296 (3d Cir. 1992)(holding that a party cannot escape *Rooker-Feldman* by raising a new constitutional theory in federal court unless the party lacks a realistic opportunity to fully and fairly litigate the constitutional claim in the state court proceeding). Anderson cannot invoke federal jurisdiction by couching

his claim in terms of a civil rights action. *See Ritter v. Ross*, 992 F.2d 750, 754 (7th Cir. 1993). Here, Anderson's claim for injunctive relief is inextricably intertwined with the state court's judgment, and the district court lacked jurisdiction to review that decision. *Feldman*, 460 U.S. at 483-84 n. 16.

For the foregoing reasons, we affirm the district court's judgment, in part for reasons different than those expressed by the district court. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN
Clerk